1959

Max E. Birch and Fontella Birch v. Forrest W. Fuller and Judith Hyde Fuller et al : Petition for Rehearing, Brief of Appellants

Utah Supreme Court

Gordon I. Hyde; Forrest W. Fuller; Attorneys for Appellants;

IN THE SUPREME COURT OF THE STATE OF UTAH

E. BIRCH and FONTELLA BIRCH, wife,

Plaintiff-Respondents,

v.

EST W. FULLER, JUDITH HYDE ER, KENNETH W. JUDD and F. JUDD,

Defendant-Appellants.

Case No. 8822

PETITION FOR REHEARING

BRIEF OF APPELLANTS

GORDON I. HYDE and
FORREST W. FULLER,

Attorneys for Appellants

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IN THE SUPREME COURT OF THE STATE OF UTAH

MAX E. BIRCH and FONTELLA BIRCH, his wife,

Plaintiff-Respondents,

v.

ORREST W. FULLER, JUDITH YDE FULLER, KENNETH W. UDD and RUBY F. JUDD,

Defendant-Appellants.

Case No. 8822

PETITION FOR REHEARING

Come now the defendant-appellants and respectfully petition Court for a rehearing of the above entitled matter and for onsideration of the matters set forth in the opinion of The rt filed April 21, 1959.

Dated this 24th day of May, 1959.

Forrest W. Fuller
Attorney for Appellants

BRIEF OF APPELLAN 'S

It s not t e desire of petitioners 'o unduly belabor po n s
ıg only slight economic conse^quence but as has been said by
·son: " Every m:nd (has) its choice betwee tru h and re^po
)u can never have both Petitioners feel that 'here are three
within 'he opinion of The Court which are not consistent
with th^ aw or with the record in this case upon which they
like the opport: nity to express themselves further.

STATEMENT OF POINTS

[I. THE EARLIER OPINION OF THIS COURT FILED DECE
2, 1958, INADVERTANTLY EXTRACTED FROM THE BRIE
:SPONDENTS FACTS WHICH ADMITEDLY WERE NOT IN TH
RD. THESE FAC' S WERE OF SCANDALOUS NATURE AND
:OURT SHOULD CORRECT THE DAMAGE DONE BY ITS
'ER OPINION

II. THE COURT ERRED IN UPHOLDING THE FINDING OF
OURT BELOW THAT THE APPELLANTS HAD NO CONTRA
RESPONDENTS AND IN AFFIRMING THE JUDGMENT FOR
'ER OF TITLE.

III. THE COURT ERRED IN AFFIRMING THE JUDGMENT
E COURT BELOW FOR TRESPASS BY CONSTRUCTIVE
SSION.

ARGUMENT

OINT I. THE EARLIER OPINION OF THIS COURT FILED

EMBER 12, 1958, INADVERTENTLY EXTRACTED FROM TH
F OF RESPONDENTS FACTS WHICH ADMITEDLY WERE NO
HE RECORD. THESE FACTS WERE OF SCANDALOUS
RE AND THE COURT SHOULD CORRECT THE DAMAGE
BY ITS EARLIER OPINION

Since the same erroneous facts do not appear again in the recent opinion of The Court, it may be assumed that the concedes the error of their inclusion within Its first opinion, ving thus conceded the error, should grant defendants still g motion to strike these facts from the brief of respondents ould further, strike them from the minds of those to whom ginal opinion was distributed by some modest corrective nt in Their final opinion. Defendants do not demand the of counsel for plaintiffs, although there is considerable for such demand, but merely request that the damage done e.

POINT II

HE COURT ERRED IN UPHOLDING THE FINDING OF THE BELOW THAT THE APPELLANTS HAD NO CONTRACT SPONDENTS AND IN AFFIRMING THE JUDGMENT FOR R OF TITLE.

reply to the argument of defendants that the evidence does e bad faith or malice the Court in its opinion states. "It

lifficult to discern what other motive defendants had in filing lis pendens, particularly in view of the transmission by one he defendants of a rather insulting letter to the plaintiffs some months earlier." This language it is feared apparently substites the test of anger and insult for the element of malice which been oft defined by this Court as "the want of probable cause" f of Appellants, pages 3 and 4, and op. cite.) While the angeltingly expressed by one of the defendants in his letter, Ex- "F", might demand an apology it is certainly not sufficiently ng to demand that the heretofore existing legal definition of ce in slander of title actions be changed by judicial decision. e instant case, under the definition of malice obtaining at the the defendants could not be liable if they had probable to believe they had a bona fide claim and were asserting the in good faith. This test must be applied as at the time the ding was done for even though they later abandoned their and failed to file their complaint no damage was done. In states no damage could be assessed even if no contract d and even if the slanderer lacked probable cause for the ding, for the plaintiffs made no effort to sell the property

nscript, Birch REC 81) and hence lost nothing by the record-
f the lis pendens. But in Utah attorneys fees may be granted
t is necessary to determine whether the defendants had prob-
cause for filing the lis pendens.

The Court in its opinion finds competent evidence in the
d that Sather was not to be bound by the series of transactions
natter is not particularly germane for the cause against
was dismissed upon the motion of plaintiff (Record, page
however the Court has treated the matter and defendants
likewise. The competent evidence referred to must appear
exhibits or in the testimony of Judd for this matter is not
elsewhere. Judd indicates that he knew Sather was trying
Birches place from tax sale, was a friend of his (Judd's)
the (Judd) asked Sather to see if he could get a loa
ript Judd D 71. This testimony, even taken out of con
ext, for Judd identifies Exhibit 11 later (Transcript p.
66 and 67) does not raise the inference that the loan
only consideration or that Sather was not to be bound by
ements referred to. Indeed, the safety of Sather and

tiffs demands a contrary result as does the fair significance
testimony for if Sather was not bound by Exhibit "A", then
fair inference remaining is that Birch and Sather defrauded
city Loan and Finance for their joint mortgage to this con-
Exhibit "C", mortgages the Uniform Real Estate Contract
in Exhibit "A", at page 2, paragraph 2, of such mortgage
is considerable doubt that this was their intent. If Sather
ot bound by Exhibit "A" per se he must have ratified it when
signed it, Exhibit "I", or when he revised it, Exhibit "E".
Defendants urge that any man armed with Exhibits "A" and
ould have probable cause to file a lis pendens or other pro-
affidavit after learning of Exhibit "B", the release and
nation of the contract found in Exhibit "A". That these
ants did honestly believe they had a contract is best evinced
fact that they, Judd at least, entered upon the property and
onsiderable improvements without objection by Birch. If
ther doubt exists that they honestly felt they had a claim
serted the same in good faith it may be forever disposed of
rence to Exhibit "F", where, no matter how insultingly,
asserts the claim, demands that the title be cleared. notes

payment has been made, and requests that the same be
ed upon the contract balance. Significant in this respect
s the fact that the notice served, Exhibit "G", names Sather
co-defendant with Birch. No more than this honest assertion
apparently bona fide claim is needed even though the claim
d or later nullified. See Brief of Appellants pages 3 and 4,
cite.

However, since the court below ruled that no contract existed
is Court affirms such finding, and, further since if a con-
lid exist the position of defendants can only be strengthened,
tter is treated here, briefly. The exhibits introduced on
ace create such a contract. No other possibility exists.
exhibits and the matter therein contained is absolutely bind-
n plaintiffs (and hence the court) for they are their own
e and they cannot be impeached or modified by parole.
ode Annotated, 1953, 78-25-13, 78-25-11, and 78 25-16.
f the witnesses comment upon these exhibits and the contrac
contain except Judd. While his testimony is at best con-
e does identify Exhibit "I" and recalls that it was executed
lace. Transcript Judd-D-63 and 67. The testimony of

was not the basis for the trial court's finding for the court

"It is quite evident to me that he (Judd) doesn't know. He thinks there was a contract between the parties entered into here but he doesn't know which one it was. He probably never saw it... He said he didn't know anything about that (Exhibit "A"). It is quite apparent he doesn't... I don't think he knows anything about it personally... Some body told him he could go in there is probably what happened." Transcript, Judd-D-67, 68 and 69.

uite obvious, in view of such comment, that the court below not and did not base its finding that no contract existed upon stimony of Judd, and no other basis for such finding exists. ourt, in its opinion, comments that no one objected to this of the court below. Such is not the case for having based ntire defense to the slander of title action upon Exhibit "J", ants objected as best they could. They appealed. And h they did not make such finding the subject of a separate their brief they very carefully pointed out the record con- thing justifying such or any similar finding. Brief of nts, page 4. This is sufficient.

erhaps, the confusion generated and the finding was based hibits "B" and "E". If so, this can be cleared up by only mment. The release and termination of Uniform Real

Contract, Exhibit "B", ex parte as it were, without the
ce and/or consent of Judd and Fuller could not bind them no
manner lessen their equity for both Sather and Judd signed
"I" and had actual knowledge of the assignment of Exhibit
rein contained. Neither could the revision and attempted
sion to an option contained in Exhibit "E" for the same reason
ding was therefore completely reasonable when applied to
but completely unfounded when extended to include Judd
ler.

short, Judd and Fuller, had probable cause to believe
a contract, armed as they were with Exhibits "A" and
d to state the matter even more strongly, they in fact
h a contract and the plaintiffs proved this beyond any
This, then, was their "other"motive for filing the lis

POINT III

HE COURT ERRED IN AFFIRMING THE JUDGMENT OF URT BELOW FOR TRESPASS BY CONSTRUCTIVE SION.

e Court, in discussing this matter, says: "We do not be-
endants contention that it was error to give judgment for

pass is sustainable. Defendants said they had never been on property, but the answer admits that they were in possession pursuant to an agreement made by plaintiff to sell to defendants." landmark in the law of trespass merits comment, for if one concedes the allegation in defendants answer this will the first departure in the case law treating trespass quare um fregit where one in possession has committed a wrong to possession. Heretofore the gist of a trespass to realty lies disturbance of another's possession. Brief of Appellants, on for Rehearing, page 6. While this possession was only constructive possession as follows title in the case of st W. Fuller, Judith Hyde Fuller, and Ruby F. Judd, it was possession in the case of Kenneth W Judd. This possession defendants is the most compelling single argument for re- the court below, but others are legend.

The plaintiffs did not sustain the burden of proof necessary blish that the defendants or any of them were trespassers. done, is fatal.

The court found that the defendant F. A. Hatch was not in trespass and if this be the case neither are his co-

lants. While it would lie ill in the mouths of defendants to
ain that their co-defendant was awarded the remedy and
that they demanded, it must be noted that the evidence
t Hatch is stronger than it is against any of the other de-
s. He was actually upon the premises many times. Tran-
Birch-D-7, 8, 14, 21, and 23, etc. Shortly after July 4,
he following conversation took place upon the premises in
sence of Mrs. Birch, Transcript, Birch-D-15, : Question:
t that conversation. . . ?", Answer: "I told him (Hatch)
y didn't have any right on the place, that they had failed
ise the option, and that he was a willful trespasser and
'We are going to keep this hay deal.' I said, 'You know
a willfull trespasser' and he said, 'I admit it but I am
'". In spite of this the Court found no money judgment
latch. These defendants urge, that if credible justifica-
ed for this result, that same reason, excuse, or what
ends to all other defendants to a much greater degree
of them were never on the property at all. This should
nt.

The defendants are not liable for trespass for the plaintiffs' them into possession. Transcript, Birch-D-7, 8, and 9, etc made no objection to the entry of Hatch, Judd, one Smith, the ly employees and several Indians. Although Birch is quick to it out that he did so because of the May 4(?), option with Sathe ibit E and those who did go on the property went on pursua xhibit I" It matters little that each had his own reason for on, they were on for all purposes, and in possession. Once ich peacable possession they could not trespass against their possession (constructive and/or actual) and the plaintiffs. der to terminate possession and make continued possession wful must rely upon the statutory remedy of unlawful detainer serve their notice to quit since the contract forfeiture provis Uniform Real Estate Contract and/or the termination of the n (?) are not self operative. Carstensen v. Hansen 107 U 152 P 2d 954 Leone v. Zuniga, 84 U 417, 34 P 2d 699 L.R 1232, Lambert v. Sine, 256 P. 2d 241, and King v. 3 U (2d) 419, 285 P. 2d 1114, 1118. While defendants have been liable under such a cause of action for su h ges as occurred, they are not liable for trespass for their

session was never terminated or made unlawful as by law pro

ed.

The defendants Ruby F. Judd, Forrest W. Fuller and Judit

e Fuller cannot be liable for the wrongful acts of Judd and

:h, if any, for, "Where several persons are engaged together

common purpose (and even this was not proven here) and a

pass is committed by one or more of them, assent thereto

ıe others is presumed only if the common design is unlawful.

'e the object to be accomplished is a lawful one, assent is a

:r of fact to be proved. 52 AMERICAN JURISPRUDENCE 889

pass sections 75, 76 and 77. Italics and parenthetical comme

: writer. Defendant Forrest Fuller was at best a tenant in

ion and certainly tenancy in common and the entirely agraria

its conducted by the defendants Judd and Hatch are not per se

ful, and no other common design or purpose and/or assent

:oved. In fact quite the contrary was evinced. Certainly

. Judd, and Judith Hyde Fuller, who were not parties to

the contracts and were never on the premises were not

sers.

ven if the defendants were trespassers, and such is not

ase, no damages could be assessed, for no attempt was made
e plaintiffs to apportion or set forth with any certainty just
acts were done by Judd and which acts were done by Hatch,
hich acts were done by their servants and employees, and
empt was made to establish which acts were done prior to
, 1957, and which acts were done after July 4. "While the
iff need not prove his case beyond a reasonable doubt, evi-
affording only a basis for mere speculation and conjecture
he cause of plaintiff' injuries is wholly insufficient as a
upon which to rest a verdict for damages.". and, "... when
more tort-feasors acting independently of each other inflict
..one cannot be held liable for the trespasses of the other..
ERICAN JURISPRUDENCE, Trespass, 861, 892, sections
80.

)ne remaining area of confusion exists. The Court in its
states: "The trial court indicated that only testimony re-
o damages suffered because of the trespass need be adduced
ven if this were the case it should be reversed for there
some showing other than that the damages occurred for
ndants must have entered, and such entry must have been

ngful for if such is not proven or stipulated to, no matter how
ve the damages, the defendants are not liable for them. Defen-
s never stipulated that they were trespassers, or that they
ed any damage and the record bears this out. Plaintiffs never
ed such to be the case and the record bears this out. Even so
rial court never (in context) indicated that the only testimony
heard was that relating to damages. Transcript Birch-D-4.

COURT: "I thought we were going into the question of damages
ot into a lot of these preliminary matters."

MR. MAXFIELD: "If it could be stipulated and just have the
nony as to them, we would be willing to do that."

THE COURT: "And that it was wrongful."

MR. HYDE: "No, we won't stipulate that it was wrongful."

THE COURT: "No, I say that they must establish that it was
ful."

This exchange, made right at the beginning of the trial is
and convincing. The frame of mind of the court was that the
es must be proven and that they (plaintiff) must establish
e acts were wrongful. Again at page 54 of the transcript,

rch-C-54, words of similar protent are repeated:

THE COURT: Just a moment, we are going far afield, Mr. de. I thought we wanted to confine this to the matter of tres- is anddamages and I think we ought to do that.

MR. HYDE: Isn't it relevant whether or not they are operat under some agreement when they were on the property?

THE COURT: "He stated they were. There is no question ut that -- during May, at least, until the latter part of June, rding to his testimony."

It is obvious that on the one hand defendants claimed under contracts and on the other that plaintiffs claimed they were not ing and that for this reason the court attempted to limit the th of the trial by excluding testimony other than as to damages as to the wrongful character of the acts creating them. Trans pages 107 - 110, inclusive. The only reason he was not letely successful is that the plaintiffs insisted on going into tatters sought to be precluded, at great length and the Judge y let them do so. They introduced as their own, Exhibits hrough "I" and the court let them in. Once in evidence they for all purposes and their content and purport binds the

intiffs conclusively.

CONCLUSION

The defendant-appellants concede that The Supreme Court y, where the circumstances compel such a result, over-rule sting case law, and change it accordingly. However, if such one, the facts which compel such action and the defects in the ting law should be pointed out in the opinion in order that de- ed counsel when they find themselves on the other side of the tion, and others concerned with the law, may cite the decision rately or distinguish it as the case may be.

In the instant case defendant-appellants respectfully urge tha ich compelling reason in the fact situation presented or defect e existing law exists. Plaintiff-respondents fell woefully : of sustaining the burden of proof that the defendant- lants trespassed, in fact they proved that some of them were on the property and that all others entered and remained heir own consent and without objection on their part. Plain- espondents proved beyond the shadow of any doubt that the lant-appellants had a contractual agreement to purchase operty of plaintiff-respondents and that they relied upon

nd asserted such claim honestly and openly. The lower court
ould be reversed in both matters and the action dismissed.

It should not lessen the strength of the argument of all
fendants to point out that the wives, Ruby F. Judd, and Judith
de Fuller, were not parties to any of the contracts, nor did
ey enter upon the premises. Their only wrong was to be
med as plaintiffs in the abortive notice to quit or pay rent,
hibit "G", and to be named as defendants in the complaint of
intiffs. No greater wrong can, or has been attributed to
n. Certainly in their case the court below should be reversed.

Respectfully submitted,

FORREST W. FULLER

Attorney for Appellants